Obstacles of the Current Concept of Waqf to the Development of Waqf Properties and the Recommended Alternative

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Abstract

Centuries passed and the controversy over the object of *waqf* is still on going. For those who thought that the controversy was over have actually followed the views of majority concerning the irrevocability, perpetuity and inalienability of the object of *waqf*. By adhering to this thought, *waqf* properties have faced various problems relating to their effective management and development thereof. This paper attempts to rethink the concept of *waqf* perpetuity and inalienability, and proposes to replace the perpetuity of the physical being of the object with that of dedication by assigning a value to the dedication which is then safeguarded and invested. This paper acknowledges the validity of all valuable *waqfs* including cash, usufruct, and labour which are capable of perpetuity according to the principle of value based concept of *waqf* properties.

Keywords : Waqf Development Obstacles, concept, traditional and revised

1. Introduction

Waqf, which literally means "religious endowment", is recognised by the Islamic law as religious, pious or charitable donation. It has been a source of development such as the building of mosques, madrasah, educational institutions, libraries, travellers' lodges, and inns. Its benefits are not restricted to the Muslim community alone but goes beyond religious, cultural, racial and sectarian boundaries.[1]

Waqf is one of the finest fruits of Islamic civilizations; yet, proper attention is not given to its study[2] . The neglect of *waqf* for the last two centuries or so has resulted in a great number of underdeveloped and abandoned *waqf* properties in various Muslim nations. Due to this vacuum, the complexity of the concept of *waqf,* and the pigeon holes of financial and legal institutions, a solution to the problem of *waqf* development is still to be found.

Various jurists and writers have identified the economic, political, legal, and educational problems as the main factors that affect the development of waqf properties. The following discussion is, however, focused on the conceptual difficulties that give rise to the rigidity of *waqf* institution in general, and the development of *waqf* properties in particular.

This paper offers a brief discussion on the meaning, definition, and classification of *waqf*; attributes of *waqf*; their effects; and the review and redefinition of the

[1] Amitabh Mukerji,1990, 1991: 109
[2] Ibid

concept. This effort is necessary for if these attributes of *waqf* are not reviewed and an alternative to such a concept is not found, the *lawfulness* of several methods and schemes of finance of *waqf* properties would remain questionable.

2. The Classical Concept and Characteristics of Waqf

The familiar term, for trusts, in the texts of Syariah, is *sadaqah* and *habs*. Nevertheless, jurists also use *waqf*, which is sometimes written as wakaf or wakap in South East Asia. In Northern Africa, the jurists still use the word *habs* or *tasbil* for the same concept.[3] The Shi'i scholars however differentiate between *waqf* and *habs*; both are charitable but have slightly different implications.[4]

Literally, both *waqf* [5] and *habs* mean to hold, confine, detain, or restrain. Legally, they mean "to protect something, by preventing it from becoming the property of a third person"[6] . Various classical definitions of the *waqf* are given but the articulation of Abu Yusuf from Hanafi school seems to be preferred by Imam Mouhammad, and being agreed by jurists in Shafi'i, Hanbali and Imami schools.[7]

A rephrase of definitions by these jurists shows that *waqf* is irrevocable gift of a corporeal property ('*ain*) for the benefit of donor's family or someone else or something, in perpetuity, as a charity promised and executed normally during the life-time of the donor, which is not capable of transfer, gift, and transmission thereafter. The main characteristics of classical *waqf* are, therefore, irrevocability, perpetuity, and inalienability. This is discussed below.

2.1 Irrevocability

Irrevocability means the lack of power of the settler (*waqif*) to revoke his donation at any time. According to Abu Yusuf *waqf* is effective and binding as soon as the declaration is made by the donor without any need for delivery of possession to the beneficiary. To him, the property is transferred from the ownership of the settler to the 'ownership' of Allah and hence irrevocable.[8] This opinion is accepted by the majority of jurists in the four schools of Islamic law.[9] Hence, except in the case of *waqf* by will and on death-bed, the declaration must be intended to take effect immediately.

In Malaysia, both statutes and case law uphold the irrevocability of *waqf* declarations. The respective Enactments of the States expressly make it non-transferable, subject to few conditions. For instance section 4 of the Selangor *Wakaf* Enactment 1999 reads:

(1) A wakaf shall immediately come into effect once all the requirements and conditions of the wakaf had been fulfilled, unless it is expressly provided that it shall commence only after the death of the waqif.

(2) A wakaf which has come into effect cannot be sold or transferred by the waqif or be inherited by any person.

In *Haji Salleh Bin Haji Ismail & Anor V Haji Abdullah Bin Haji Mohamed Salleh & Ors* [1935] 1 MLJ 26, Whitley, J. upheld the opinion of Muslim jurist as he wrote: "The ownership of the thing immobilised is transferred to God; which means that such object ceases, for men, to be subject to the right of the private property, and that it henceforth belongs neither to the founder nor to the beneficiary. (Minhaj et Talibin, p. 232)."

In *Re Dato Bentara Luar Decd Haji Yahya Bin Yusof & Anor V. Hassan Bin Othman & Anor* [1982] 2 MLJ 264, 1 LNS 16, where revocability by the waqif was at issue, Salleh Abas FJ, as he then was, ruled that:

> A valid wakaf, like the one under appeal, *takes effect immediately from the moment of its creation* [emphasis added]. The ownership of the wakaf property is in law immediately vested in God Almighty. The legal requirement that the property must be registered in the name of the beneficiary or the mutawalli is only for the purpose of its administration. We cannot see anything wrong or objectionably that this wakaf land was registered in the Dato's name, and continued to be so registered, because there being no mutawalli appointed, he must be taken to assume the role of the mutawalli. Further, the subsequent subdivision of the wakaf land and the transfer of a subdivided portion of it to a third person do not in any way indicate or prove that the Dato' never intended to create the wakaf. The wakaf created by him had already taken effect. His conduct in subdividing and charging the wakaf property may

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3 Mohammad Tahir Sabit "The Concept And Objective of Waqf", [2004], 1 *Shariah Law Reports*, p. 10.

4 See Yahya bin Sa'id al-Hilli, *al-Jami' li al-Shara'i'*, Qum: Musassah al-Shuhada' al-'Ilmiyyah, 1405 A.H., p. 368.

5 On the basis for the validity of *waqf* see Sabit "The Concept And Objective of *Waqf*", p .10.

6 Al-Sarakhsi, *al-Mabsut*, Cairo, 1956, vol. 12, p. 27, http://feqh.al-islam.com/Books.asp; translation by Mohd. Zain b. Haji Othman, Islamic Law with special Reference to the Institution of Waqf, Kuala Lumpur: Prime Minister's Department, Religious Affairs Division, 1982, p. 21.

7 Muhammad Abu Zahrah, *Muhadarat fi al-Waqf*, np: Dar al-Fikr-alArabi, Second Edition, pp. 39-40, 62-69; for Shafi'ies views see Muhammad al-Sharbini, al-Khatib, *Mughni al-Muhtaj ila Ma'rifat Alfaz al-Minhaj*, kitab al-waqf, http://feqh.al-islam.com/Books.asp; for Hanbalies, see Mawfaq al-Din, Ibn Qudamah, *al-Mughni*, kitab al-wuquf wa al-Ataya, Al-Riyadh: Maktabah al-Riyadh al-Hadithah, 1401 AH, vol. 6, p. 185, found on http://www.almeshkat.net/books/open.php?cat=11&book=464..

8 Al-Sarakhsi, *al-Mabsut*, vol. 12, p 41.

9 Al-Kasani, Ala' al-Din Abi Bakr bin Mas'ud, *Badai' al-Sana'i' fi Tartib al-Shari'i'*, vol. 6, pp. 346-347, http://feqh.al-islam.com/Books.asp

appear to be inconsistent with the wakaf, but this conduct cannot disprove the existence of the wakaf or its validity although it might well amount to breaches by the Dato' of his duties as its mutawalli."

The above statutory and case law confirms the irrevocability of *waqf* titles without any doubt. These, as a whole, are a step towards the realization of perpetual charitable gifts (*waqf*).

2.2 Perpetuity

Few issues need to be clarified before discussing the legality of perpetuity. First the meaning of perpetuity and second the relation between irrevocability, inalienability and perpetuity.

2.2.1 *What is perpetuity*

The Arabic term for perpetuity is *ta'bid*; three meanings may be associated to the term. First, that once the declaration of *waqf* is made by the donor, a legally binding *waqf* is automatically effected. Second, that *waqf* cannot be constrained by time and temporariness. Third, the subject matter of the waqf should remain so forever. Perpetuity, hence, includes irrevocability, as is the case in the first meaning. The classic opinion on perpetuity is implied by the second and third while inalienability may be inferred from the third; the third in fact indicates the perpetuity of *waqf* in the sense of perpetuity of the subject matter.

Perpetuity and irrevocability, at first, may appear the same, but, irrevocability means that the donor has no power to revoke *waqf*. This does not imply perpetuity all the times, for a temporary *waqf*, may not be revoked. Imam Abu Yusof recognised temporary *waqf* and refused to accept its revocation by the donor.[10] In other word, irrevocability can exist without perpetuity of the dedication. Similarly, it is possible that the proceeds of a temporary *waqf* may be fossilised even though the subject matter reverts to the settler. Perpetuity and inalienability also appear the same. Nevertheless, where the subject matter of *waqf* is movable or of temporary nature, inalienability of the object of the *waqf* during that time will be maintained but not its perpetuity.

2.2.2 The perpetuity of the object

The majority of Muslim jurists agree on the perpetuity of waqf [11] . Real estate (e.g. land) is the ideal subject matter of *waqf* which according to al-Termidhi[12] is upheld by the consensus of *ulama*. Movable property, such as goods and animals, as the subject matter of *waqf*, is not permitted by some jurists. To these jurists, the *waqf* property must be perpetual except otherwise is permitted by text or sound reasoning. For instance, the *waqf* of horses is acceptable according to the text of the *hadith*, and the *waqf* of trees and buildings is approved by Hanafis and Shafi'ies, because of their annexation to land. This group of jurists do not allow cash and food *waqf*.

For *waqf* to be valid, the Hanafis made perpetuity a condition. "If it purports to be made for a limited period or for a temporary purpose, it is void"[13] as held by some Hanafi ulama. The Shafi'i jurists are presumed to hold the same view. Hence, only in the Shafi'i and Hanafi schools whenever the term *waqf* is used, permanence is presumed. Therefore, subsequent jurists have interpreted this rule as to prohibit temporal declaration of *waqf* and that the object of the *waqf* should be capable of perpetual existence, except in some special cases. This thought still exists in the minds of many local jurists.

The old legislations maintain the idea of perpetuity of *waqf*. Section 2 of the *Administration of Islamic Law (Federal territories) Act 1999*, defines "*wakaf* 'am' as: *a dedication in perpetuity of the capital and income of property* [emphasis is added]. Similar provisions are found in some states Enactments.

It is clear that the perpetuity of dedication is intended but the perpetuity of the object is subject to interpretation. Following the provisions on the inalienability and non-transferability of the subject matter of *waqf*,[15] read together with the decision of the court in *Re Dato Bentara Luar Decd Haji Yahya Bin Yusof & Anor V. Hassan Bin Othman & Anor* [1982] 2 MLJ 264, one would presume that both the perpetuity of dedication and its subject

[10] See Munzer Kahf, *Towards the Revival of Awaqf: A Few Fiqhi Issues to Reconsider*, Paper presented at the Harvard Forum on Islamic Finance and Economics, 1999, Harvard University, p.1, available on Kahf net; al-Sarakhsi, *al-Mabsut*, vol. 12, p 27.

[11] Al-fatawa al-Hindiyah (Alamgiriya), vol 2, *Kitab al-Waqf*, Shurutahu. Also http://feqh.al-islam.com/Books.asp; al-Sharbini, *Mughni al-Muhtaj*, vol. 2, p. 485; Al-Bujairami, Sulaiman bin Umar bin Muhammad, *Hashiyah al-Bujairami ala al-Minhaj*, Kitab al-Waqf, Ahkam al-Waqf al-Ma'nawiyah, vol. 2 p. 62, http://feqh.al-islam.com/Books.asp

[12] Al-Termidhi, *Sunan al-Termadhi*, al-Ahkam 'An Rasul Allah fi al-Waqf, Hadith No. 1296.

[13] S. Ather Husaini & S. Khalid Rashid, 1973:112. *Al-Fatawa al-Hindiyah*, Kitab al-Waqf, Shraituh;

[14] Al-Subki, *Takmalah al-Majmu' Sharh al-Muhadhdhab*, Dar al-Fikr, vol 15, p. 320 (kitab al-Waqf) http://feqh.al-islam.com/Books.asp

[15] See for example Section 4 (2) of *Selangor Enactment 1999*, s. 91 of *Kedah Administration of Muslim Law Enactment 1962*, s 62 of Council of the religion of Islam and Malay Custom, Administration of Kelantan, *Enactment*, 1994 and s 62 of *Administration of Islamic Law (Federal Territories) Act*, 1999

matter are intended in the meaning of the term perpetuity which is confirmed by the practice in Malaysia.

2.3 Inalienability

Inalienability is close to perpetuity, but unlike perpetuity, the inalienability of the subject matter of *waqf* is rooted in the *hadith* of the Prophet (pbuh).[16]

Inalienability means that after a valid declaration is made, the subject matter of the *waqf* 'passes out of the ownership of the *waqif* and it cannot be alienated or transferred either by the *waqif* or the *mutawalli* nor do their heirs can take it by way of inheritance'.[17] According to this rule, jurists also prohibit the administrator from mortgaging or pledging the *waqf* property as security for a loan, simply because whatever cannot be sold cannot be mortgaged too. Following this rule, the mortgage in the modern sense, whereby the bank can sell a property, would not be permissible. For this reason, recently the Saudi judiciary allowed the revenue (*ghalah*), and not the subject matter of *waqf* (*asl*), to be charged. For instance, under the Saudi Law, where the *waqf* land is barren and has no revenue, the *nazir* can apply to the court together with the development plan, for leave to charge those buildings which are to be constructed on the land.

In Malaysia, with the exception of Kelantan, the rule of inalienability is upheld by all statutes. Section 4 (2) of *Selangor Enactment 1999*[18] , for instance, provides that all properties are vested in the Majlis and prohibits any conveyance, assignment, or transfer whatever' affecting *waqf*.[19]

The above three characteristics of *waqf* are upheld by the majority of legal scholars in all generations including today. Although, these attributes are helpful in the preservation of *waqf* property to an extent, one should not ignore the rigidity of the concept in the modern context, and their negative effects on the productive utilisation of the subject properties. These negative effects are explained below.

3. The Immediate Effects of the Concept

Despite the sincerity of the previous scholars to the preservation of *waqf* and upholding the wishes of the *waqif* to the fullest, the two characteristics of *waqf*, that is perpetuity and inalienability, as implied by the definitions of early and modern jurists, negatively affect the development of *waqf* property. In turn, this causes stagnation of the Islamic charities. This negative effect may be seen in the lack of liquid assets on the one hand and conflict with some laws on the other; the latter being a further cause to other legal and financial constraints.

Among the three characteristics of *waqf*, irrevocability may not be harmful as manifested in the freezing of any dealing relating to the transfer of title. This freeze safeguards the dedication in various ways. First, where the settler or the *waqif* is the *mutawalli* himself, the rule of irrevocability removes confusion among the heirs and officials of court, for it would be certain that the settler has not revoked his declaration. This will prevent the heirs of the *waqif* from arguing against the existence of *waqf* where the settler-mutawalli has entered certain activities implying revocation of the *waqf*. Irrevocability certainly proved its usefulness in *Re Dato Bentara Luar Decd Haji Yahya Bin Yusof & Anor V. Hassan Bin Othman & Anor* [1982] 2 MLJ 264, 1 LNS 16, mentioned above, where the court interpreted the activities of the settler-mutawalli to be a breach of his duties as *mutawlli*. Second, irrevocability bestows long-term powers on *mutawalli* and therefore making his dealings in the *waqf* property non-risky for investors. Otherwise, the permissibility of revocation of *waqf* would cast uncertainty of joint venture and, as a result, would cause the waqf property not to be effectively and productively utilized.[20]

The negative effect of irrevocability is limited only to the settler; that is when the *waqif* himself is in need of help and assistance. Another possibility arises where the donated property does not serve its objective or where it is underutilised due to certain circumstances during the lifetime of the donor. Should the *waqif*, in this case, be allowed to revoke his gift? Only a minority of jurists would permit revocation.[21] However, it may be argued that the reason to allow revocation may not be needed, as a clause in *waqf* declaration allowing the *mutawalli* to sell the property in special cases (e.g. the land is unproductive) may suffice. Where there is no such clause

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16 See the Hadith of Umar (r) where the Prophet said the property should not be sold, given as gift, and inherited.

17 Faiz Badruddin, 1919: 555

18 Also of *Kedah Administration of Muslim Law Enactment 1962*, s. 91; of Council of the religion of Islam and Malay Custom, Administration of Kelantan, *Enactment*, 1994, s 62; of *Administration of Islamic Law (Federal Territories) Act*, 1999 s 62

19 It is contended that inalienability under National Land Code (NLC) is doubtful. Despite the pronouncement of State laws, the registration of waqf land under NLC except in statutory mode of registration, prevent the grant of title in perpetuity. This is so because the State under mode of surrender and transfer may grant leas-hold title. On top of all, the manner of transfer of title under NLC repudiates the very basic nature of *waqf* properties in Malaysia, for the law (NLC) vests ownership of property in the Majlis despite the fact that all State legislations concerning *waqf* emphasize that the Majlis is the trustee (mutawalli/nazir) of the *waqf* properties. See the detail on various mode of transfers in Siti Mashitoh Mahamood, "Harmonization of the Malaysian National Land Code 1965 and the Shariah of *Waqf*: Recommendations for Amendments" in *On Harmonisation of Shari'ah and Civil Law Towards a Methodology of Harmonisation*, Conference Papers, IIUM, 2005, p. 194

in the document, the *mutawalli* can opt for ibdal and *istibdal*[22] , charging of revenue (*rahn*), as well as seeking court's leave in order to remedy the underutilisation and non-productivity.[23]

Unlike irrevocability, perpetuity is the main cause of underdevelopment. A shortcoming inherent in the concept of perpetuity is non-liquidity of the assets. Very often, the majority of the *waqf* institutions have a large number of real estate but little cash, insufficient to develop the land or even to maintain it.[24] Due to the idea of perpetuity, the administrator neither can sell the property nor aggressively seek financing for its development through mortgage. Freeze of these two facilities makes the administrator of *waqf* helpless as is happening in many *waqf* institutions.

The pre-modern jurists especially in the Hanafi and Hanbali schools have devised several schemes to counter the negative effect of perpetuity by allowing the exchange of estates or sell (*ibdal* and *istibdal*). This method of finance, however, has the peril of losing some assets due to the abuse of the process, as for example, some administrators in collaboration with judges transferred *waqf* properties to their names.[25] Apart from this possibility, the method of barter and selling one property in order to purchase another seems difficult as it takes a long period of time to replace the given *waqf* property with a comparable one, because this will need the assessment of the valuers, suitability of location, bargain and consent of the owner of the targeted land, leave of court for selling the *waqf* property, and eventually performance of the formalities under the present land law of the country.[26]

Another negative effect of perpetuity is that it makes the administrators of *waqf* property cashless. The public, due to the traditional perception of *waqf,* presume that they can participate in *waqf* only if they have immovable property which is expensive and exclusively available to the rich Muslims. Such a presumption makes the landless individuals not to contribute and, as a result, *waqf* remains a gift to a specific group of rich individuals. The majority of Muslims, who can contribute, not significantly though, are barred from participation in the welfare of the community. Yet, the few land owners are reluctant because of the higher price of the land.

Lastly, the shortcoming of perpetuity is that it gives rise to the prohibition of temporal *waqf.* Temporal donation could have generated income, as those land and property owners who did not wish to part with their assets permanently, could have donated it for a short span of time, the income of which could be either spent or invested, and the return of which could be used for charitable purposes.

In sum the concept of perpetuity stops the flow of cash to *waqf* institution and prevents the existing assets from liquidity, the latter being enforced further by the other concept of *waqf* called the inalienability.

The effect of inalienability is also akin to perpetuity, but they differ as the former prevents new funds from flowing and fossilises the existing one while, the latter only freezes the property from being freely developed and transacted. Inalienability affects *waqf* property in a way that it cannot be the subject of any sale, mortgage, gift, inheritance or any alienation whatsoever.[27]

While selling the *waqf* property under normal circumstance is not encouraged as it may end up in the termination of waqf, subjecting the property to a charge[28] or *rahn*, however, is in the interest of the *waqf.* Unfortunately, some jurists have disallowed it thus, subsequently, *waqf* property cannot be financed because the present Malaysian land laws and financers, including Islamic ones, requires collateral as a precondition. This is not possible in the case of the *waqf* property for *waqf* is inalienable. This needs to be changed. For such a change to happen, there is need to re-examine the concept of inalienability of *waqf* together with perpetuity, and if possible to substitute it with a new concept.

4. Reviewing the Classical Concept of Waqf

Perpetuity and inalienability of *waqf* are the main obstacles to the development of *waqf* land, thus, affecting its contribution to the welfare of the society. For this reason, the concept of *waqf* needs rethinking. In the following discussion, an effort is made to compile the minority opinions and study them together with the views of the majority, in order to find a broader platform.

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20 Abdullah bin Musa, al-Ammar, "Istithmar Amwal al-Waqf" in *Muntada Qadaya al-Waqf al-Fiqhiyyah al-Awwal, Iltizam Shar'i ... wa Hulul al-Mutajaddidah*, Kuwait: al-Amanah Ammah li al-Awqaf, 2004 , p 207

21 As practiced in Sudan: Hasan Abdullah Al-Amin, al-waqf fi al-fiqh al-Islami, in "Idara wa Tamiyah, Jeddah", 1994, p. 129.

22 ibid, p 209

23 In Malaysia for instance see ss 2, 19, 20 of Wakaf (State of Selangor) Enactment, 1999.

24 Anas al-Zarqa, "al-Wasail al-Hadithah litamwil wa al-Istithmar," in *Idara wa Tathmir Mumtalakat al-Awqaf, Jeddah: IDB, 1994*, pp. 184, 185.

25 Ibn Abidin, Muhammad Amin bin Umar bin Abdul Aziz, *Radd al-Muhtar sharh Dur al-Mukhtar*, (*Hashiyah Ibn Abidin*), kitab al-waqf, Beirut: Dar al-Fikr 1386 AH vol 4, p. 386, http://feqh.al-islam.com/Books.asp

26 see Abdul Hamid b. Mo Iman, Shafiah bt. Mohd Shariff, and Shahruniza bt. Md. Shah, *The Concept of Istibdal and Proposed Development Financing of Waqf Land, Research Report*, Faculty of Engineering & Geoinformation Science, 1999. Mohd. Khairani Md. Midah, *Mengkaji Aplikasi Mekanisme Istibdal dalam Pembangunan Tanah Wakaf di Negri Johor, Kes Kajian Kota Tinggi dan Pontian*, (PSM thesis) Universiti Teknologi Malaysia 2003.

To do this, first, the views of early jurists are examined before exploring the possibility of a wider perspective.

Perpetuity in the traditional opinion indicates the infinity of dedication, something not objectionable, and also of its subject matter which is the cause of many problems. The majority of jurists have considered the subject matter of *waqf* to be perpetual, and hence the donation of land and other immovable property remained to comprise *waqf* especially among the Hanafis and Shafi'ies. Later, the *Fatawa* in Almagiri[29] stated that 'according to all[30] perpetuity is also among the conditions of *waqf*, and therefore *waqf* without perpetuity is invalid'. Faiz held further that '*waqf* purported to be made only for a limited period of time is void according to all schools of law'.[31] These assertions are unfounded, in Quran, Sunnah and *ijma*'.

The concept of perpetuity is not expressly established in the *sunnah*, It is only deduced by Muslim jurists from the Prophet's *hadith* about the *waqf* of the sayidina Umar (r) that the land should not be sold, given as gift or inherited. This hadith can be interpreted differently.

First, the *hadith* of Umar (r), concerning *habs* is a form of *sadaqah jariyah* and if read together with other hadiths of *sadaqah* it will become clear that a *sadaqah* that recurs after the death of the donor is also a *habs* as long as the donation keeps benefiting Muslims (as long as it exists: *madam jarat*). The *hadiths*, according to Kahf,[32] establish the permissibility of a permanent and temporal *waqfs*. Therefore, one cannot claim that perpetuity is permitted as a general rule and the recognition of temporal *waqf* as exceptional, because that would be unjustified; both forms of charity are provided by hadiths and should be treated equally.

Second, the reported hadith must be read as a whole including the part saying: 'if you wish you can detain the corpus and let its benefits go to welfare'. The *hadith* in this way gives liberty (which also implies the permission of other forms of *waqf*) to the owner of the property to perpetually give his property in *waqf*.

This *hadith* does not prohibit other forms of *waqf*. To say that other forms are not valid is not founded on any legal text except human reason and analogy. Analogical reasoning, as a rule, is suppressed at the interest of the community,[33] and due to the change of circumstances, it is the interest of the community to allow all forms of *waqf* mentioned in the classical *fiqh*. This is justified in the light of another juristic principle: the rule is permissibility until there is evidence against its validity. Considering this principle one should then choose liberal approach in cases where the text is for permissibility and choose rigidity if the text prohibited the action. Since *waqf* is for the benefit of *ummah* and there is no restriction on donors,[34] all types of *waqf* should be allowed.

No consensus of companions of the Prophet (*sahabah*) or subsequent generations of jurists is found on the perpetuity of *waqf* or *habs*. The validity of *waqf* in the specific form of sayidina Umar (r) may have been confirmed by *ijma'*, but, as it is about one form of *waqf* and the *ijma'* is *sakuti* (silent consensus), one cannot exclude other forms of *waqf*. The report of al-Termadhi[35] who held that land as *waqf* is held valid by consensus does not mean an *ijma'* on perpetuity. Qadi Shuraih[36] , Sha'bi, Ibn Abbas, and Ibn Mas'ud did not recognise *waqf*, at all.[37] Imam Abu Hanifah considered *waqf* as a loan, and hence revocable.[38] Malikis[39] are of the same view.

Temporal *waqf* is allowed by Imam Abu Yosuf[40] and Malikis[41] , and currently recognised in Sudan[42] and by Egyptian law of *waqf*.[43] Kahf considers the prohibition

27 S. Ather Husaini & S. Khalid Rashid, 1973:113

28 Charge is the creature of National Land Code, and it applies to all transactions irrespective of the contract being under conventional or Islamic law: *Bank Kerjasama Rakyat Malaysia Bhd V Emcee Corporation Sdn Bhd* [2003] 2 MLJ 408.

29 *Al-Fatawa al-Hindiyah*, *Kitab al-Waqf*, Shara'ituh

30 The text of the *fatawa* mentions the term 'kul' which could mean all in the *madhhab*. This is not correct because Imam Abu Yosuf allows temporary *waqf*.

31 Faiz Badruddin,1919:550.

32 Munzer Kahf, *Suwar Mustajida min al-Waqf*, 2004, pp. 5-6, Available on kahf net.

33 See Sami Muhammad al-Salahat, "al-Tajrubah al-Waqfiyah li Dawlah al-Amarat al-Arabiyah al-Muttahiddah, Amarah al-Shariqah Namudhajan", (1996-2002), No. 5, *al-Awqaf*, October 2003, at p. 63

34 See *al-Qur'an* al-Tawbah, 9: 91

35 *Sunan Termadhi*, vol. 2, p. 417

36 Shihabuddin Ahmad bin Idris, al-Qurafi, *al-Dhakhirah fi Fiqh al-Maliki*, vol. 6, Kitab al-Waqf. Beirut: Dar al-Gharb al-Islami, 1994, p. 313.

37 Al-Sarakhsi, *al-Mabsut*, al- kitab al-Waqf, vol. 12, p.p 28-29

38 Ibid, vol. 12, p 27-28

39 Al-Qurafi, *al-Dhakhirah*, vol. 6, p. 322

40 Ibid., vol. 12, p 41

41 Ibn Arafah, in *Sharh Hudud Ibn Arfah*, madah waqf : http://feqh.al-islam.com/default.asp

42 Hasan Abdullah al-Amin, "al-Waqf fi Fiqh al-Islami", p. 129.

43 S. 16, Law No. 48.

44 Monzer Kahf, *Towards the Revival of Awqaf*, p 2.

45 al-Qurafi, *al-Dhakhirah*, vol. 6, p. 313.

46 Sayed Khalid Rashid, "Current Waqf Experiences and The Future of Waqf Institution", 5 *Awqaf*, 2003, at p16; Shawqi Ahmad Dunya, "al-Waqf al-Naqdi: Madkhal li Taf'il Dawr al-Waqf fi Hayatina al-Mu'asirah", in 3 *al-Awqaf*, 2002. p. 57 and at p. 66-70; Hussain Hussain Shihatah "Ististhmar Amwal al-Waqf", in *Muntada Qadaya al-Waqf* al-Awqaf,2004, p. 157. Al-Qurafi, *al-Dhakhirah*, vol. 6, pp. 312-3:
According to Imam Shafie and Ahmad, anything that can be used and utilized recurrently is suitable for *waqf*.

of temporal *waqf* as a lack of respect for the wishes of the founder of *waqf*.[44] This certainly rebuts the existence of consensus, either in Hanafi school or in others, as claimed by the fatwa in Alamgiri. Al-Qurafi in rejecting this view, argued that there are hadiths allowing many types of properties as *waqf* [45]. In fact, jurists in all schools, recognised, under certain circumstances, movable property such as trees, plantation, animal, and books, which, by nature, are not perpetual.

Imam Zufar has allowed cash[46] without attaching any condition. The majority of Malikis[47] allowed cash and food stuff [48] as *waqf* though some held to be *makruh*.[49] The *Hanbalis*[50] are deemed to have not allowed cash but according to Ibn Taymiyah the various rulings on the invalidity of cash *waqf* are based on the opinions of al-Khiraqi and those who followed him. There is no opinion of Imam Ahmad on the point, and hence according to Ibn Taymiyah cash may be a valid subject of *waqf*.[51] At present, countries which validate cash *waqf* are Egypt, Iraq, Syria, Iran, Turkey, India, Pakistan, Burma, and Singapore.[52]

Furthermore, some Hanbali jurists especially Ibn Taymiyah allowed mosques to be sold and exchanged if that is beneficial to the community.[53] Some Shafi'i jurists allowed the dedication of dog for purposes of *waqf*. This according to al-Subki[54] is permissible because of its use and benefit (manfa'ah). Thus, according to al-Subki, *manfa'ah* or benefit might be the object of *waqf* and, therefore, as long *something can be used recurrently* and benefits can be received, it can be the subject matter of *waqf*.[55] Accordingly, for something to be given as *waqf,* it must be capable of recurring benefit, not necessarily perpetual.

In Malaysia the idea of perpetuity of the subject matter seems to have lost its ground in some such as Selangor, Johor and Kelantan.

Section 2 of the *Waqf (State of Selangor) Enactment 1999* defines property as to "include any movable or immovable property and any interest in any right, interest, title, claim, chose in action, whether present or future or which is otherwise of value in accordance with *Hukm Syarak*;" The same section defines *waqf* as "the dedication of any property form which its usufruct or benefit may be used for any charitable purpose whether as *waqf* am or *waqf khas* according to *Hukm Syarak*, …". These definitions seem to be in line with the opinion of al-Subki and the opinion of the Maliki School. This statute has recognised the *mawquf* to be any property (mal) as long as it is valuable in the eyes of *Shariah*. This is, so far, the clearest and most advanced legal tool for the development of *waqf* property. The term *hukum Syarak* here, if applied broadly, would include those properties which have value in the eyes of *Shariah*, and includes any property recognized by the early, present or future *ulama*.

Johor under section 17 of *Kaedah-Kaedah Waqf, 1983*, recognized both perpetual and temporary waqfs. Under the same section, except Masjid and that for Masjid, all *waqfs* could be either perpetual or temporary, the latter including *family waqf*, which should not go beyond two generations or 60 years after the date on which the *waqif* passes away. Under section 13 of the Kaedah Kaedah Waqf 1983, the *mawquf* (the subject matter of the *waqf*) can be equity shares, cash for share in a *waqf*, called *saham waqf*. This recognition of equity and cash to be converted into shares (*saham*) in immovable property is a step in the development of a more dynamic approach to the concept of *waqf*, which is a clear deportation from the traditional concept of perpetuity limited to land and the like.

Following the above reasoning, one can conclude that perpetuity of the subject matter is not express in legal texts, and also, it is not held by consensus. This, and having regard to its negative effects on the development of *waqf* property, it is proposed that perpetuity should not be the core characteristic of *waqf*. Hence, a philanthropic donation may be in any form: in perpetuity, temporal, real, usufruct, and rights or interests, the proceeds of which should be either used on the beneficiaries, if the subject matter is capable of revenue, or be amortised and invested, and even in case it is not capable of perpetuity and amortisation, there is no reason for blocking its validity as *waqf* as long as it benefits the institution of *waqf* and *ummah*.

Just like perpetuity is not unanimously held by jurist, inalienability may also be disputed. The early jurists, where it was necessary for the purposes of a *waqf*, allowed the Qadi to authorize a sale or vary the rules

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47 *Jawahir al-Aklil*, vol 2, p. 306, http://feqh.al-islam.com/Books.asp; al-Qurafi, *al-Dhakhirah*, vol. 6, p. 313

48 Al-Kashnari, Abu Bakr bin Husain, *Ashal al-Madarik Sharh Irshad al-Salik fi Fiqh Imam Malik*, vol 2, Bierut: Dar al-Kutub al-Ilmiyah, 1416 AH, p. 221.

49 Al-Hattab, Muhammad bin Muhammad bin Abd al-Rahman al-Maghribi, *Mawahib al-Jalil fi Sharh Mukhtasar al-Shaikh al-Khalil*, vol. 6, Dar al-Fikr, 1992, p.22; also on http://feqh.al-islam.com/Books.asp and http://www.islamweb.net/ver2/library/Books.php,

50 Ibn Qudamah, al-*Mughni*, vol. 5, p. 373.

51 Ibn Taymiyah, *Majmu al-Fatawa*, vol. 31, p. 234.

52 Sayed Khalid Rashid, "Current Waqf Experiences and The Future of Waqf Institution", 5 *al-Awqaf*, 2003, at p. 16.

53 Ibn Taymiyah, *Majmu'al-Fatawa*, vol 31, pp. 215-244, http://feqh.al-islam.com/Books.asp

54 Al-Subki, *Takmalah*, (kitab al-Waqf) vol 15, p. 320

55 This is also mentioned by al-Qurafi above (note 46).

of management of the *waqf*, even if such was expressly forbidden by the founder of the *waqf*. Further, it was held that a *waqif* may authorize contracting debts for repairs and taxes, mortgaging the dedicated land or its produce when there was no income of the *waqf*. They even allowed selling part of the dedicated land for the above mentioned purposes including mosques. Hanafi jurists allowed *istibdal*, if the *waqif* is silent. The Hanbali School permitted *rahn* or mortgage of *waqf* property for enhancement of *waqf* revenue. This in turn goes against the view of those who proposed inalienability of title in *waqf* properties.

The rule of inalienability, apparently, is strictly followed all over Malaysia except Kelantan. The letter of law in all those state enactments makes *waqf* property not transferable and not transmittable.[56] The rule of inalienability may be relaxed in Johor and Selangor, where *istibdal* is recognised. Section 9 (1) of Johor law authorises the department of *waqf* to conduct *istibdal*, with permission from the Majlis, and according to subsection 2 of the same section the proceeds of the *istibdal* can be movable and immovable property. Compared to Johor and Selangor, section 62 (2) of the Kelantan Enactment is express. It provides that the Majlis can 'administer, transfer, charge, enter into joint venture, invest the money and property of the *waqf am* whether movable or immovable for the purpose of developing and increasing the income of the properties in so far as it is allowed by the *Hukm Syarak'*. Subsection 2 eliminates the effect of subsection 1 of section 62 (i.e. the rule of inalienability). This subsection is considerable a departure from the conventional view of Shafi'i school, therefore, accommodating *istibdal*, and *rahn*, even though it is merely in the interest of *waqf*. It is apparent that the Kelantan law goes beyond the Saudi judicial view, as it allows both sale and charge without qualification.

All in all, it is clear that the rule of perpetuity and inalienability is not absolute. Further, inalienability is akin to perpetuity. Since perpetuity of the subject matter of *waqf* is not unanimously upheld by jurists, the rule of inalienability loses its ground too. Furthermore, irrespective of the rule of perpetuity, inalienability of the object is discarded when there is need or it is for the interest of *waqf*. Having this in mind and the existence of conflicting views, plus the negative effect of these perceptions, the need for a redefinition of *waqf* arises.

5. Redefinition of Waqf

In view of the discrepancies in the classical thought, a redefinition based on a new interpretation is needed. *Waqf* needs not only be real property but labour as well as an impale amount of cash in order to develop and manage real property.[57] The institution of *waqf* will greatly benefit, should the public be asked to contribute to *waqf* in terms of cash and other less expensive forms.

5.1 The Alternative Concept of Waqf

Monzer Kahf, one of the contemporary jurists, who sees the classical concept of *waqf* in need for review and redefinition, has attempted to define *waqf* as: holding a *maal* (an asset) and preventing its consumption for the purpose of repeatedly extracting its usufruct for the benefit of an objective representing righteousness and philanthropy.[58] *Mal* (an asset) means 'continuously usufruct-giving' things 'as long as its principal is preserved'.[59] Preservation of principal may result from its own nature as in land or from arrangements and conditions prescribed by the *Waqf* founder.[60] The definition covers the traditional concept of assets of *waqf* i.e. perpetual, and that which has beneficial life span. In other word his definition also covers temporary *waqf*. Thereby, he lists several new forms of *waqf* that were not discussed in the classical literature, such as the *waqf* of financial rights and *waqf* of usufruct. This he achieves by using the term *maal*, which can include both financial rights, such as publication right of a manuscript, and usufruct, such as usufruct of a rented asset according to the majority of *Fuqaha* and the contemporary collective *Fatawa* of the OIC *Fiqh* Academy.

Kahf still remains loyal to the idea of abstention from consumption in order to keep the asset available for repeated extraction of usufruct. This interpretation of *waqf* is not helpful as it does not offer fundamental change, though one should agrees with other contents of his definition.

Kahf's definition seems to circle around the same parameters of classical writings, with a difference that Kahf has amalgamated the various opinions without identifying a rule that can justify his definition. Hence, this study attempts to identify a rule that is in accordance to the spirit of the hadiths, the various practices of the companions, and comprise the diverse views of the classical jurists.

To supplement Kahf's definition, it is thought that *waqf* should be identified *as the perpetual dedication of benefits of a valuable, the value of which is amortized subsequently, and its proceeds or revenue are later spent on welfare of the named beneficiaries.*
Perpetual dedication of benefits does not mean perpetual physical object which is the subject matter of the dedication. It is to be read together with 'value' of the benefits. Perpetual dedication of benefits is obtained by

56 ss. 91(Kedah), 62 (Federal Territary), 4 (2).
57 Anas al-Zarqa, "al Wasail al-Hadithah", p. 184.

amortization of the value of the object. The object of the dedication could be of any kind: it can be perpetuity or intangible. The term valuable instead of maal is used to cover human labour which may not be implied by *mal* as its usufruct. Perpetual dedication of benefits does not exclude temporal use of an object, which might be for a month.

The definition allows temporality and alienability of the object; it, however, emphasizes on the valuation of the dedication (the value of the benefits) even if it is for a shorter time. The object may be given in perpetuity or otherwise, depending on the intention of the founder, but it is a condition that its value be amortized. *Waqf* whether perpetual or temporary, is considered irrevocable, save in special circumstances. Where the founder needs the dedicated property (e.g. in case of bankruptcy and the like) revocation may be allowed with the permission of court. Where the settler makes temporary *waqf,* the subject matter can be reverted to the *waqif*. The usufruct or benefits received from such a *waqf,* however, should be valued and amortised.

As proposed by Kahf, new forms of subject matter, in addition to realty, such as chattels, cash, labour, usufruct, and others as listed below can be accepted even though such as donation is for shorter period of time.[62] Perpetuity in such a case would apply to the value of the object and the appropriation of its income to charity, even tough the object itself does not have the character of permanency or perpetuity.[63] The subject matter should be seen as transitional entity showing the value of the donation, and can be transferred provided its proceeds are kept and invested in other properties. In this way, the perpetuity of *waqf* is safeguarded, as in order to make the donated items perpetual. Thus to conform to the generally accepted concept of *waqf*, one only needs to amortize the value of such donations,[64] as practiced by the companies. This perhaps is the reason why modern Muslim jurists have added company shares, stocks, and cash money to the list of items which may be given as a donation according to the principles of *waqf*.[65]

5.2 Justification of Alternative Concept

Our definition attempts to replace the perpetuity of the object with the perpetuity of the dedication benefits. Perpetuity of this dedication is achieved by assigning value to the benefits object of the *waqf* and then amortizing it; thereby bypassing[66] the perpetuity and inalienability of the object. This is not a new idea. It is developed on the back of the acceptance of cash *waqf* and *istibdal* by the early jurists.

As discussed earlier, Imam Zufar allowed cash *waqf*. This was interpreted by Ibn Abidin in terms of perpetuity. Ibn Abidin justified the permissibility of *dirham* and *dinar* as *waqf* because they can exist in perpetuity, provided the cash is invested in trade whereby the capital plus profit is returned to *waqf*.[67] One of justification for his thought was that money refers not to the physical form of silver or gold or its particular looks and physical survival as time passes. It is the value of cash which is determined in amount and then thought to exist in perpetuity.[68] This opinion of Ibn Abidin implies the distinction between dedication and the subject matter, which means that *the dedication of benefits should be perpetual and not necessarily the subject matter of the dedication.*

All those jurists who recognised *istibdal* in fact recognised the value element in *waqf*. This value element is highlighted and brought to the forefront in order to make a proposal for a unifying ground for the diverse opinions of the classical jurists. Based on this presumption, the subject matter of a *waqf*, just like cash, may change hand physically, but as long as its value is kept (amortised or reserved according to current accounting practice), the wishes of the donor are honoured.

Accepting the perpetuity of dedication of benefits instead of perpetuity of the subject matter or replacing perpetuity of object with perpetuity of its value complies with the opinions of all schools. Yet, no damage is caused to the objective of *waqf*, for once a dedication is made the proceeds of such *waqf* shall remain infinitely even though the object of the dedication is non-existent or change hands in consideration for other valuables. By doing this, the concept of *waqf* does comply with the letter of the *hadith*, where the subject matter of the *waqf* is land, as long as its disposal is not needed. Only in contingencies, we uphold the spirit of the hadith and hence choose to substitute it with its value that should be determined, recorded for purpose of determination of losses in future, and amortised.

The benefit of this idea is a switch from non-liquid capital to liquid capital; that the subject matter of *waqf*, just like in the case of cash which may change hands, can be sold and charged, if (1) the disposal is in the interest of the *waqf*, (2) complies with general principles of Shari'ah and (3) is suitable to the nature of *waqf*. Provided always, that their value be kept as *waqf*, for the same purpose, in

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58 Munzer Kahf, *Financing the Development of Awqaf Property*, Paper presented at the Seminar on Development of *Awqaf* organized by IRTI, Kuala Lumpur, Malaysia,1998, Available on kahf net, p. 4

59 Ibid.

60 Ibid.

61 Id. p. 5.

62 Kahf, *Suwar al-Mustajidah li al-Waqf*, pp. 13-24; Kahf, *al-Waqf al-Islami, Tatawurruhu, Idaratuhu, Tanmiyatuh*, Beirut: Dar al-Fikr, 2000, pp. 188-189

63 ibid

perpetuity. This conforms to the spirit of the *hadith*, and as al-Salahat contends, should be decided according to the interest of community, nature, or need of *waqf*, and the demand of time and circumstances.[69]

The recognition of value-based *waqf* and eventually the difference between the value and assets may expose landed *waqf* to unforseen risks of misappropriation. This is unavoidable even if the *status quo* is preserved. As far as the value-based concept is concerned, we propose two fold measures against misappropriation and mismanagement. First, the disposal of the assets should not be the first option for the manager. If there is no other way, such disposal should be subjected to the collective decision of the *waqf* institution and a leave from a court of competent jurisdiction. Second, the accounts of the *waqf* funds should be made transferrent and should be annually audited by independent auditors.

Additional measures may be taken by subjecting the management, accountants, and auditors to professional liabilities, as well as personal accountability similar to that applicable to normal companies and trust corporations. Certainly, currently *waqf* and its affairs are within the jurisdiction of Syariah Courts, whose powers are limited. This can be rectified by incorporating separate *waqf* management bodies under companies Act, 1965, and thus subjected to the jurisdiction of civil courts assisted by judges of Syariah courts. Alternatively, a chapter outlining the duties and powers of the *waqf* manager, should be inserted in the *waqf* laws of the states, whereby and according to such provisions of the amended law, the Syariah courts, helped by professional assessors, are empowered to hear cases of negligence and misappropriation according to the principles of Syariah and best practices of accounting and management.

6. Proposal for the Operation of Value-Based Concept of Waqf

As mentioned earlier, we seek to highlight the difference between the value and the physical being of the subject matter. The former is considered the principal capital registered in the principal account and the latter being transitional entity representing the value of the object of *waqf* for the purpose of creating liquidity in the assets of *waqf* without harming the perpetuity of *waqf*.

The value-based object of dedication, which replaces the perpetuity of subject matter goes beyond the boundaries of immovable and movable property. Therefore, a dedication could be actualised by amortization of the value of

- land, trees, and buildings (title together with usufruct);
- the revenue of land and buildings for a specified time;
- goods and chattels capable of revenue such as cars, tools, equipments etc;
- equities and shares in companies;
- rights and warrants in companies;
- saham waqf;
- cash;
- goods to be used for a particular purpose such as textbooks, health equipment; and
- services provided by individuals.

The above list may be divided into two categories: things which are capable of generating revenue and otherwise; each of which must be treated differently.

6.1 Revenue-Generating Waqf

All income-generating *waqf* objects irrespective of perpetuities or otherwise, should be valued in cash and this cash value should be considered the principal capital of *waqf*, hereafter referred to as value-capital. All efforts should be made to safeguard the value-capital and to invest it.

6.1.1 Safeguarding the value-capital

Only the value-capital (VC) should be considered perpetual and, therefore, be maintained all the time. This can be done by having a reserve account which may be part of a larger fund to be called hedge fund, to which a portion of the income of the object can be diverted for the purpose of compensating losses.

In case of land, a distinction should be made between the value of land at the time of dedication and its substitution (*istibdal*). When the market value of the object is determined and latter on its value is appreciated, the additional or appreciated portion should form the value of the capital not its revenue. The same rule should apply to depreciation of the value before it is sold. Where the land is sold and the recorded value depreciates later due to risky investment, funds from reserved accounts be transferred to compensate the losses.
In other cases, all goods should be regarded as *waqf*, and the institution of *waqf* should be under the duty to record their values. That values should be amortized and just as

[64] The value of the subject matter will be kept in a special fund which is then amortized. Only the income of such fund would be distributed among the beneficiaries.
[65] Munzer Kahf, *Waqf: A Quick Overview*, p. 2.
[66] Cf. Munzer Kahf, *Towards the Revival of Awqaf:*, p. 2 (Available on Kahf net).
[67] Ibn Abidin, *Radd al-Muhtar*, kitab al-waqf, vol. 4, p.p 363-364
[68] Ibid.
[69] Sami Muhammad Al-Salahat, *al-Tajrubah al-Waqfiyah li dawlah al-Amarat al-Arabiyah*, Amarah al-Shariqah Namudhajan, pp. 58, 63

in case of landed *waqf*, the non-landed *waqf* should have recurrent proceeds (i.e. investment revenue) distributed on beneficiaries, after a portion of which is reserved.

The reserve account (RA) is not only to service losses but also to spend on normal ware-and-tear and other damages. At a time, the object may need replacement, or repair. If the accumulated funds in the reserve account are equal to or greater than the cost, depending on the life-span of the object and the amount it generates, an amount equal to the costs of repair and replacement be withdrawn from the reserve account. Otherwise, the deficit can be compensated by diverting funds from accounts with surplus, or in case there is no surplus, a portion from those accounts which have the capability of reaching the value of the particular *waqf* object. In this case, the original *waqf* object may become borrower or joint-*waqf* (*waqf al-mushtarak*), if the amount is not paid back to the transferring account. Converting individual *waqf* to a *mushtarak* should be the last option.

The reserve account should go in tandem with the life of the *waqf* object. This is proposed for the sake of the *waqif* as well as the *mawquf* and the larger interest of the community. If a good person donates one ringgit and eventually it is multiplied by the *waqf* institutions, the *sadaqah jariyah* of the *waqif* is multiplied. At time it will save *mawquf* that was donated by the *waqif*, and other time it will assist other *waqf* properties. In case there is no such eventuality, the multiplication of funds and henceforth their income is benefiting the *ummah*.

6.1.2 *Investing the value-capital*

Each amount in the capital account (CA) and hedge funds (HF) must be invested either internally, i.e. financing the development of other *waqf* properties or externally provided that the investment is legal and economically profitable. For this, each *waqf* property should have an account investment (IA) and revenue account (RA). Subsidiary to revenue account, a reserves account (RA) in parallel to that for the distribution of the revenues (DA), should be created. The reserves amount can be kept in the larger fund i.e. the hedge fund (HF) (see Figure. 1 & Figure 2).

The reserves account (RA) can be kept merely to have records of the amount subtracted from the revenues of the *waqf* property, their annual income, and expenses. The actual amount should be transferred to hedge fund where an investment account should be opened for the transferred amount, managed and serviced by the hedge fund managers. This investment account should not be in fixed asset form; that is an estimated amount, the estimate of which is done by principle account managers, must be open to withdrawal. Such a withdrawal may be

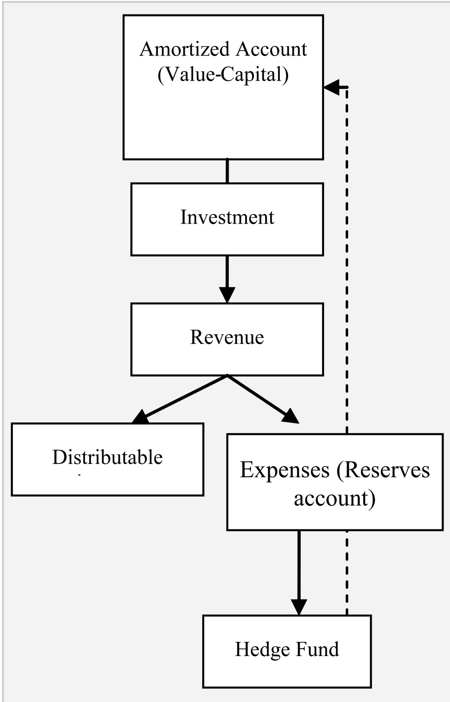


Figure 1 : Value-based waqfs

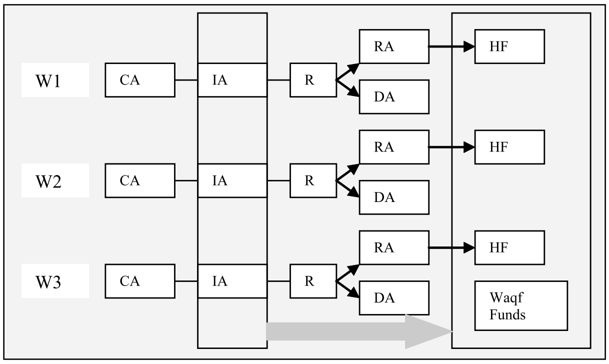


Figure 2 : A model of waqf accounts
W = waqf, CA = capital account, IA = investment account, R = revenue, RA = reserves account,
DA = distributable account, HF = hedge fund

flexible but should not damage the prospect of growth and good investment. This is in case the reserve account has sufficient funds, otherwise, the other contingency measures, as mentioned above, be applied.

Where the object of *waqf* (*waqf* property), which is the asset of the principal account, does not need service, repair, replacement, and so on, or such a need has not arisen in the course of time, and the reserves account exceeds the value of the principal value of the *waqf* property, the access can be transferred to the principle account (i.e. value-capital), thereby raising the principle capital of *waqf*, and hence added to the name of the *waqif*, the revenue of which can be subjected to the same measures as the original value capital.

6.2 Non-Revenue-Generating Waqf

While it is easy to think of value-capital and reserve account in case of land and other revenue-generating goods, it is however, difficult in the case of goods donated for recurrent use or direct consumption, usufruct and services provided by individuals. By following the value-based concept of *waqf*, each item donated and each service provided by a volunteer should, as a duty of the nazir, be measured by their value, which is recorded and then invested.

As time has changed, and the original one-man-management has been replaced by institutional-management, the time is ripe to think of new measures to suit such change. In the institutional-management of *waqf*, therefore, nothing should go without record and value requisition and then such a value being subjected to appreciation or depreciation as time passes by. Each time an equipment is donated, a principal value capital account be assigned to it, and its value should be recorded there. In order to realise the value, a minimal fee should, based on a sound calculation, be charged on its use by the public or who needs to use it. These fees should be credited to the principal value-capital account, invested by the institution, and the revenue of which should be divided into expenses and reserves. The reserved amount be invested and then treated as mentioned above.

Similar formula can be applied to the time and experience of the volunteers. Their services should not be taken for granted. The services they provide have market value, and that can be either paid by the public at a minimum fee, or bought by reserve accounts. A practice of some organisations that spend cash on the services of professionals is not encouraged, for in a value-based system, one has to treat all *waqfs* fairly. For this reason, the donation of the rich to pay to service providers would also require an account of their own, subjected to the requirements mentioned above.

7. Conclusion

In the classical term, *waqf* is an irrevocable perpetual gift of a corporeal property (‘ain) for the benefit of donor’s family or someone else or something as a charity promised and executed normally during the life time of the donor which is not capable of transfer, gift, and transmission thereafter.

Perpetuity of *waqf* is popularly presumed to be held unanimously by all Muslim jurists and its inalienability derived from the Hadith of the Prophet. Irrevocability, although is neither a matter of legal texts, nor upheld unanimously by all Muslim jurists is added to the characteristics of *waqf*. Ironically, the latter is less harmful to the preservation of *waqf* than the perpetuity and inalienability of the subject matter of *waqf*.

This paper rebuts the popular thought and takes waqf to a new ground by making a distinction between the perpetuity of the physical being of the object and its ‘dedication’ of benefits. Dedication of benefits is considered perpetual by assigning a value to it but its physical form is subjected to transfers. New *waqf* can be declared in the non-traditional way. Old *waqfs*, however, may still remain subject to the old conditions as long the greater interests of the *waqf* are not threatened by these conditions.

The recognition of the perpetuity of dedication of benefits and assigning value thereto has led to the recognition of collateral issues. That is, the replacement of physical subject matter by its value necessitates the validity of accepting any valuable thing as the medium of *waqf*. Cash, equities, goods, and services are treated the same as land and other immovable properties. To each of them a value is assigned, recorded and, to be invested as the case may be. By this, the door of rigidity is closed and thereby also the controversy over the validity of such things is made obsolete. It is hoped that value-based capital *waqf* would eliminate once and for all the problem of non-liquidity of the *waqf* assets, which will encourage the public to contribute to the enrichment of *waqf* institutions by having large funds that not only settle waqf problems but also contribute to the welfare and development of Muslims at large.

Wallahu A’lam.